

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BENJAPON SAKKARAPOPE,)	
)	No. 64934-5-I
Appellant,)	
)	DIVISION ONE
v.)	
)	
WASHINGTON STATE UNIVERSITY,)	UNPUBLISHED OPINION
)	
Respondent.)	FILED: August 16, 2010
_____)	

Becker, J. — Washington State University employed appellant Benjapon Sakkarapope as a temporary employee, exempt from civil service protection, while he pursued a graduate degree at the university. When the university terminated his employment, he requested that the Department of Personnel take remedial action to appoint him as a permanent employee. Sakkarapope claimed he was entitled to remedial action because he exceeded the 1,050 hour limit on the number of hours a temporary employee can work under state personnel regulations. The department found that when the hours he worked while enrolled as a student are deducted, he did not exceed the limit, and consequently denied his request. Sakkarapope's appeal relies on the

university's internal policy defining "student" in a way that, if applicable, would allow some of the hours he worked as a student to be included so that his total temporary hours would exceed 1,050. But Sakkarapope cannot establish that the university's internal definition was part of the state personnel regulations that govern the remedial action process. The decision to deny his request for status as a permanent employee is affirmed.

Sakkarapope worked periodically as a temporary employee for various departments of Washington State University between 1992 and 2003 while pursuing several graduate degrees. His temporary employment was a combination of student and nonstudent employment. The university disenrolled him in spring semester 2003¹ and classified him as a nonstudent employee. The university terminated his employment at that time because, during the previous year, he had exceeded the 1,050 hourly limit for nonstudent employees. The university did not offer him a permanent position.

Sakkarope sought to become a permanent employee through the process of "remedial action" defined in regulations promulgated by the Department of Personnel. As a preliminary matter, we note that the higher education personnel regulations, formerly found in chapter 251 WAC, were reorganized in 2005

¹ The university disenrolled Sakkarapope for his failure to complete his master's degree program after receiving several deadline extensions. Sakkarapope unsuccessfully appealed his 2003 disenrollment and his previous dismissal from a Washington State University doctoral program in 2000. Sakkarapope v. State Bd. of Regents, Wash. State Univ., noted at 129 Wn. App. 1017 (2005), review denied, 158 Wn.2d 1004 (2006).

under chapter 357 WAC. This action, initiated under the previous rules, “must be completed under those rules.” WAC 357-04-120 (2009). Our references are to the former regulations that govern in this case.

Higher education institutions are subject to the state civil service law. Former RCW 41.06.040(2) (2004). Student, part-time, and temporary employees are exempted from the protections of the civil service rules. Former RCW 41.06.070(1)(I) (2004). The civil service rules for higher education apply to all personnel in higher education except those specifically exempted. WAC 251-04-030 (2003). “Students” who are exempt are those “employed by the institution at which they are enrolled” and who meet other criteria not relevant to this case. WAC 251-04-035(2)(a) (2004).

An exempt temporary employee is a person “employed to work one thousand fifty hours or less in any twelve consecutive month period”; if a temporary appointee exceeds the 1,050 hour threshold, the appointment may be subject to remedial action. WAC 251-04-035(2)(d) (2004). Enforcement of a time limit on temporary employment is necessary to promote efficiency in appointments and to prevent agencies from circumventing the civil service rules. See Bankhead v. City of Tacoma, 23 Wn. App. 631, 636, 597 P.2d 920 (1979).

Appeals are governed by chapter 251-12 WAC (2003). An employee who believes his appointment does not comply with the higher education personnel rules may request the director of the Department of Personnel to take remedial action. WAC 251-12-600 (2003). “Remedial action includes the power

to confer permanent status, set salary, establish seniority, and determine benefits accrued from the seniority date.” WAC 251-12-600(2) (2003). An otherwise exempt temporary appointment may become subject to remedial action if the appointee’s hours exceed the 1,050 hour threshold. WAC 251-12-600(1)(b) (2003); WAC 251-04-035(2)(d) (2004).

In March 2003, Sakkarapope requested the director to take remedial action and grant him permanent employment, back wages, and benefits retroactive to March 2001. Sakkarapope claimed he had worked over 1,050 hours as a temporary employee from March 16, 2002 to February 24, 2003.

In July 2003, the director denied Sakkarapope’s request. The director found that Sakkarapope was enrolled as a student during the hours he worked in fall semester 2002, and those student hours could not count toward the 1,050 hour threshold. Without them, Sakkarapope had not worked in excess of 1,050 hours as a temporary employee, and therefore he was not eligible for remedial action.

Sakkarapope appealed to the Personnel Appeals Board under former chapter 41.64 RCW. (Effective July 1, 2006, that board was replaced by the Personnel Resources Board. See RCW 41.06.111). At a hearing held in July 2004, Sakkarapope argued that the hours he worked in fall 2002 should not be classified as student hours because in fall 2002 he was enrolled for only three credits. He relied on Personnel Rule 60.26 of the university’s Business Policies and Procedures Manual, which defined a student as one enrolled for six or more

credits. The board, however, did not view Rule 60.26 as a binding personnel regulation and declined to consider it. The board instead applied WAC 251-04-035(2)(a) (2004), which exempts students who are “employed by the institution at which they are enrolled” from the provisions of the chapter 251 WAC, including the provision for remedial action. This regulation does not state that any particular number of credits is necessary to be classified as a student. In the board’s view, it means that a student who works for a university while enrolled for even a single credit is working student hours that do not count toward the 1,050 hour threshold for remedial action. Accordingly, the board denied Sakkarapope’s appeal.

Sakkarapope appealed to Thurston County Superior Court in October 2004. Among other issues, he argued that the characterization of the hours he worked while enrolled for three credits should be controlled by Rule 60.26 in the university’s manual. He relied on a personnel regulation requiring each institution of higher education to “develop for director approval a procedure which indicates its system for controlling and monitoring exempt positions as identified in chapter 41.06 RCW.” WAC 251-19-120(7) (2003). Sakkarapope asserted that Rule 60.26 should control because it was the system adopted by the university to comply with WAC 251-19-120(7) (2003). While the court rejected other arguments in Sakkarapope’s appeal, on this point the court found the board committed an error of law by refusing to consider Rule 60.26. The court stated in its oral ruling: “The evidence in this case seems to be that Rule

60.26 was the rule that was used by the university for tracking hours in most instances.” The court reversed, and remanded to the department to answer a specific question:

whether WSU’s *Business Policies and Procedures Manual*, Personnel Rule 60.26, is part of compliance by WSU with WAC 251-19-120(7), and if so, whether under the terms of Rule 60.26, Mr. Sakkarapope is a person qualified for consideration of remedial action under WAC 251-12-600, and if so, to consider whether a remedial action should be offered to Mr. Sakkarapope.

Superior court order of December 22, 2006.²

On remand to the department, a hearing was held by the director’s designee. Sakkarapope was unable to prove that the university had ever obtained the department’s approval of Rule 60.26 and therefore could not show that it was part of the university’s compliance with WAC 251-19-120(7) (2003). However, he did submit documents he had recently obtained through a public records request reflecting approval by the department in 1990 for a similar system developed by the university. The procedures approved in 1990 defined a “student employee” as one enrolled “for a minimum of seven credits during the fall or spring semesters and four credits during the summer session.”

The department did not find the 1990 approval letter to be significant and instead agreed with the university that the remedial action regulation was the controlling law. As the department interpreted its own regulations, the 1,050

²Sakkarapope unsuccessfully appealed the portion of the court’s order denying him fees, costs, and sanctions against opposing counsel, and the order denying his motions for summary judgment. Sakkarapope v. Wash. State Univ., noted at 139 Wn. App. 1078 (2007), review denied, 163 Wn.2d 1041 (2008).

hour criterion for remedial action eligibility excludes all hours worked as a student, without regard to any particular level of credit enrollment. The department also believed that even if university policies such as Rule 60.26 could be considered in the exercise of the director's discretion to grant remedial action, the result would be the same: the hours Sakkarapope worked in fall semester 2002 would be counted as student hours. In other words, the department exercised its discretion in favor of applying the broader concept of the word "student" in Sakkarapope's case. The department found the evidence presented by the university concerning Sakkarapope's immigration status was relevant because it showed his immigration status was dependent upon his being enrolled as a student. Without being enrolled as a student, he could not have continued his temporary employment at the university.

Sakkarapope appealed, this time to the newly created Personnel Resources Board.³ On March 14, 2008, the board affirmed. The board stated that on remand, the only question to be considered by the department was the question posed by the superior court. The superior court asked the department to decide whether or not Rule 60.26 had been submitted for director approval in compliance with WAC 251-19-120(7) (2003). The board agreed with the department: it had not been. Accordingly, Sakkarapope was not eligible for

³ Because Sakkarapope's original appeal to the board was filed before July 30, 2005, this court applies the rules governing appeals from the Personnel Appeals Board. RCW 41.06.170.

remedial action.

Sakkarapope appealed again to superior court. This time, the superior court affirmed. The court concluded the definition of student in Rule 60.26 was part of an internal university policy rather than a definition formally adopted into the state personnel regulations. For that reason, Rule 60.26 could not trump the prerequisites for remedial action specified in WAC 251-12-600:

The issues that I decided in 2006 resolved all the issues on appeal except the question of whether the BPPM Section 60.26 had been adopted as part of the WACs and thereby would serve as an amendment to the Department of Personnel regulations regarding permanent employees. I could not tell whether that had happened or not from the record before me then, and so I sent the matter back for resolution of that issue. The final agency decision was against the position taken by Mr. Sakkarapope and answered my question directly in the first question, and, that is, was it adopted? The answer given by the agency was no. And therefore the review that I conduct is whether there is substantial evidence to support that factual determination that it was not adopted and the conclusion as to whether the section 60.26 is properly considered part of the code. That is reviewed under the error of law standard.

There is a clear explanation in my estimation of the procedures or the history that occurred here showing clearly that this Business Policies and Procedures Manual Section 60.26 was not adopted as part of the administrative code, and that answers the question factually. The conclusion that it was therefore not part of the permanent employee regulations is correct as a matter of law.

Mr. Sakkarapope, I understand your argument, but it's not -- it is simply not a correct interpretation of the facts or the law here. One of the thoughts that I had in explaining to myself the issue here that may be helpful for others to understand is to consider two adjacent apartments, each with several rooms in there, one marked for temporary employees and the other marked for permanent employees. The BPPM is the document that governs the conduct, provides for rights and responsibilities of all persons who reside in the temporary employees' apartment. It covers a multitude of different subjects, including personnel rules for employees who are temporary employees. Across the hall is the apartment for

permanent employees, and when you cross the hall and step into that apartment, also with a number of different rooms in it, you become governed by different rules. And the issue is who controls access from the temporary employees' apartment to the permanent employees' apartment. And that issue is clear under the law. It is not WSU. It is not their rules that apply to temporary employees that control what happens when you cross the hall; it is the Department of Personnel rules and regulations adopted as part of the WACs that make clear what persons in that apartment are governed by.^[4]

Sakkarapope appeals.

Sakkarapope assigns error to past decisions by the Department of Personnel, the Personnel Appeals Board, the Personnel Resources Board, and Thurston County Superior Court. The final determination of the Personnel Resources Board (March 18, 2008) is the decision reviewed by the superior court. Former RCW 41.64.130 (2003). The superior court's order on appeal (June 26, 2009) is the decision before this court for review. We review the board's decision de novo using the same standards of review as did the superior court. Dedman v. Wash. Pers. Appeals Bd., 98 Wn. App. 471, 476, 989 P.2d 1214 (1999). We review an agency's interpretation of a regulation under an error of law standard, but give substantial weight to the agency's interpretation of a regulation it administers. Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus., 122 Wn. App. 402, 409, 97 P.3d 17 (2004), affirmed on other grounds, 157 Wn.2d 90, 135 P.3d 913 (2006).

First, we reject Sakkarapope's challenge to the sufficiency of the

⁴ Oral opinion, June 26, 2009; Report of Proceedings (June 26, 2009) at 32-34.

evidence. Sakkarapope bore the burden of proof before the board. WAC 358-30-170 (2003). He contends that the policy stated in Rule 60.26 is the same as the policy approved by the director in 1990, merely in different packaging, and the university merely reprinted that policy with minor revisions. However, as the university points out, the 1990 document actually contained monitoring systems that are not found in Rule 60.26. We conclude there is no evidence that Rule 60.26 of the university's Business Policies and Procedures Manual was adopted and approved as part of the university's compliance with WAC 251-19-120(7) (2003). This was the only question posed by the superior court on remand to the department. There is no basis for overturning the board's conclusion that the department answered it correctly. This alone is dispositive.

Although it is not necessary to our decision, we join the superior court in concluding that the underlying analysis by the department was legally sound from the beginning. Like all civil service systems, Washington's civil service laws, chapter 41.06 RCW, were designed to replace the spoils system with a merit system. City of Yakima v. Int'l Ass'n of Fire Fighters, 117 Wn.2d 655, 664, 818 P.2d 1076 (1991). The personnel regulations, including the higher education rules at issue in this case, implement the merit hiring system. For example, universities may not circumvent the merit hiring system by keeping temporary employees on the payroll indefinitely. The objectives of the civil service laws require a statewide system, one that does not vary according to the internal business policies of each institution of higher education. For this

reason, the definitions of “student” adopted by the university as part of a system to keep track of temporary employees are irrelevant. They do not control eligibility to become a permanent employee through the remedial action process.

In summary, we reject Sakkarapope’s contention that his fall 2002 hours should have been classified as nonstudent hours.

Sakkarapope also argues the board unconstitutionally denied him the right to equal treatment and equal employment opportunity based on his immigration status or nationality. The university submitted evidence of Sakkarapope’s immigration status to the department to show he could not continue his employment if not enrolled as a student. His immigration status was not mentioned by the board or the superior court as a basis for decision. And Sakkarapope does not comply with the requirement in RAP 10.3(a)(6) to provide argument and cite to legal authority in connection with this issue. Accordingly, we reject this claim.

Several other issues raised in this appeal were decided against Sakkarapope by the superior court in 2006 in the same order that remanded the Rule 60.26 issue to the department. He claims that several 12 month periods prior to March 16, 2002, should be considered to prove remedial action eligibility; that the wrong dates were used to calculate the 12 consecutive month period in his case; that the Personnel Appeals Board and the Personnel Resources Board used improper procedures in conducting their respective reviews of determinations by the department; and that misconduct by opposing

counsel violated his due process rights.

The university claims the superior court's rulings on these issues in 2006 became final at that time because Sakkarapope did not appeal them within 30 days, and therefore further review is precluded. But the university cites no authority supporting the necessity for piecemeal review by this court of the superior court order of December 22, 2006. The 2006 order remanded an important part of the case to the department for further consideration, and arguably the most orderly procedure was to wait and bring all related issues up from superior court at the same time. See RCW 34.05.562 and .574(1) and discussion thereof in Hong v. Dep't of Social & Health Servs., 146 Wn. App. 698, 708-11, 192 P.3d 21 (2008), review denied, 165 Wn.2d 1052 (2009). We recognize that Sakkarapope did manage to obtain this court's review of the superior court's order denying his request for recovery of costs and fees incurred in litigation up to that point, as well as sanctions against opposing counsel. See Sakkarapope, noted at 139 Wn. App. 1078. But the university does not explain why taking that appeal prevents Sakkarapope from raising issues not addressed in that appeal. Accordingly, we conclude Sakkarapope is not barred from review on the merits.

Having reviewed the additional claims on the merits, we conclude the superior court properly rejected them. We adopt the analysis in the superior court's oral opinion of October 6, 2006.

On various grounds, Sakkarapope requests attorney fees, costs,

expenses, and sanctions against Washington State University and its counsel. Sakkarapope has not prevailed nor has he shown any basis for sanctions. His requests are denied.

Affirmed.

Becker, J.

WE CONCUR:

Leach, A.C.J.

Cox, J.